Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

MOUNT JUNEAU ENTERPRISES, INC.,
ALASKA TRAMS, INC., ARNT I. ANTONSEN,
CHARLES KEEN AND KAREN KEEN
Petitioners

v.

THE CITY AND BOROUGH OF JUNEAU
(a municipal corporation), et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

# PETITION FOR WRIT OF CERTIORARI

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25 pp

## I. QUESTIONS PRESENTED FOR REVIEW.

1. May a governmental entity deprive a private property owner of his due process right to compensation for taking private property through a scheme wherein the governmental entity received a fraudulent deed from a third party without the property interest to convey, (and then enter into a joint profit agreement with the third party as part of the sham transaction), which lack of property interest the governmental entity knew but then used to justify the failure to condemn the property and circumvent payment for the property under the Fifth and Fourteenth Amendment of the United States Constitution and Article I, Section 18 of the Alaska Constitution, without just compensation?

2. May a governmental entity enter into a contract settling a dispute with a private property owner over taking of private property for use as a water reservoir by exchanging other property as compensation and then unilaterally abrogate the contract and extinguish the existing property rights without exercising the power of eminent domain and compensating the private property owner for taking of his property without just compensation?

3. May a government entity impair the ability of the owner of a building permit to utilize his building permit, effectively taking the building permit owner's property interest in the building permit, without just compensation?

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Petitioners respectfully pray a Writ of Certiorari issue to review the judgment and opinion herein of the final Opinion of the Alaska Supreme Court entered in this proceeding on September 6, 1996. The Alaska Supreme Court denied Petitioners Petition for Rehearing on November 22, 1996 as to said Opinion.

## IV. OPINION BELOW

The Alaska Supreme Court on September 26, 1996, Opinion No. 4396, affirmed an Alaska Superior Court decision dated January 31, 1994 granting summary judgment to the City and Borough of Juneau ("City") in regard to Petitioners claims of taking property without just compensation. The City took Petitioners' mining tunnel and filled it with water to use as a reservoir without condemning the property or compensating private property interests; abrogated a contract which settled the tunnel seizure by granting property rights in exchange for the tunnel confiscation and thus resulted in taking of property without just compensation as well as impairment of the obligation of contracts, and as a tactical ploy to gain advantage in ongoing civil litigation as to said seizure, willfully impaired Petitioners efforts to construct a tramway under a building permit after the Petitioners had expended hundreds of thousands of dollars and time on the project, resulting in a taking of the building permit without just compensation. A timely Petition for Rehearing was denied on November 20, 1996.

## V. GROUNDS FOR JURISDICTION.

A decision of the Superior Court of the State of Alaska was entered on January 31, 1994. Pursuant to Alaska Supreme Court Rules of Appellate Procedure, a timely appeal in the Alaska Supreme Court was filed. The opinion of the Alaska Supreme Court was issued September 6, 1996 and rehearing denied November 20, 1996.

Jurisdiction is invoked under Rule 10 of the United States Supreme Court Rules of Appellate Procedure. The instant petition is timely filed under Supreme Court Rule 13 since

filed within 90 days after the effective date of the final denial of Petitioners Petition for Rehearing by the Alaska Supreme Court.

## VI. CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED.

This case involves the right of due process for a property owner to just compensation for the taking of his property interests under the Fifth and Fourteenth amendments to the United States Constitution, and Article I Section 18 of the Alaska Constitution.

## VII. STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE.

Charles Keen, an ex-logger and a filmmaker, planned to turn a tunnel, known as Tunnel No. 3 into a tourist attraction. This tunnel ran under the Red Jacket and White Wing mining claims. Mr. Keen learned that Leonard Idso had been paying the taxes on the Red Jacket, White Wing and Black Diamond mining claims and in 1972 he acquired an option to purchase the claims from Mr. Idso. In 1981 Mr. Keen exercised the option and obtained the three claims. Mr. and his wife, Karen Keen, then quitclaimed their interest in the claims to Alaska Trams on October 22, 1981. Alaska Trams was, and is, intent on building a tramway tourist ride to the top of Mt. Juneau, utilizing the surface rights of the mining claim for a portion of the access on Mt. Juneau and Mt. Roberts.

The basic issues involve the City taking property rights to a mining tunnel for use as a city reservoir without formal condemnation proceedings, due process or any just compensation. After resolving the dispute by a city ordinance forming a contract which conveyed certain property rights as just compensation for the taking of the mining tunnel the City decided the tunnel claim was worth less than the property rights contractually agreed upon as compensation for taking the tunnel.

As part of a scheme to obstruct the building of the tramway and obtain an advantage the City abrogated the contract it had entered by ordinance to settle these tunnel claims, which was to convey certain property rights, to wit, an easement, air rights, and real property. Petitioners needed these properties to develop the tramway tourist attraction to the top of Mount Juneau, utilizing their surface rights to the mining claims.

In the process of abrogating this contract so as to gain such inappropriate tactical advantage and take the tunnel without just compensation the City also willfully destroyed Petitioners ability to utilize building permits for the tramway project, permits that had cost hundreds of thousands of dollars in direct costs and reliance costs.

In 1913, the owners of the mining claims granted Alaska-Juneau Gold Mining Company ("Alaska-Juneau") a limited easement to construct and maintain a transit tunnel through which to lay water pipes for the purposes of conveying water, to lay tracks upon which to run and operate trains, trams cars and other appliances for use in connection with the carriage of ore through the tunnel and for any other purposes in connection with the mining and milling of ores taken from an Alaska-Juneau mine. In 1968, Alaska-Juneau merged with other interests to become AJ Industries, Inc. On January 3, 1974, AJ Industries purportedly conveyed its limited interest "if any" in Tunnel No. 3 to Alaska Electric Light and Power Company ("A.E.L.P.") by a statutory quitclaim deed. Although the easement did not allow for the storage of water in the tunnel, A.E.L.P. nonetheless, attempted to enlarge on the easement rights, and purportedly conveyed a permanent easement for the transmission and storage of water in Tunnel No. 3 to the City on June 18, 1974. The City did not verify that A.E.L.P. had the property interest that it purportedly conveyed the right to store water.

Raymond M. O'Keefe, former Chairman of the Board and Chief Executive Officer of AJ Industries, Inc. from February 1974 to 1990, testified that the deed from AJ Industries to A.E.L.P. gave no interest in Tunnel No. 3

because AJ Industries had abandoned this easement during the 1940s when AJ Industries stopped transporting ore through Tunnel No. 3. Furthermore, Mr. O'Keefe could find no document after reviewing the records of AJ Industries that would give A.E.L.P. the right to grant the described easement to the City. Mr. O'Keefe concluded:

> As a businessman who has dealt extensively in land transactions, I am astounded that the interest conveyed by this Quit Claim deed [AJ Industries to A.E.L.P.] was later reconveyed to the City and Borough of Juneau without either the A.E.L.&P. or the city doing a title search for the interest in the property allegedly conveyed. Anyone who generally deals in land transactions would know that Quit Claim deeds are of very minimal value if the conveyor of the property has no legal interest in the property.

It is undisputed that there was no property right to create a reservoir as AJ did not have that right by the 1913 easement and thus could not convey same to AEL&P and subsequently to the City. The Alaska Court determined that the City had no obligation to conduct a title search that would have revealed the true facts and therefore Petitioners could not establish bad faith. If there was bad faith, there would be no inverse condemnation, and Petitioners would still have an action for trespass upon acquiring the tunnel property. However, there is convincing evidence that the City knew of the 1913 agreement and the limited easement rights. In a memorandum dated September 19, 1972 from a City Planner to the City Manager, Ronald L. Usher, re: AJ properties to obtain for water reserve and future water requirements and a June 21, 1973 memorandum to the City attorney where there is reference to a title report establishes the City's knowledge of the lack of property rights to convey an easement for a water reservoir by AEL&P.

Furthermore, the City and AEL&P entered into a unitization agreement on March 14, 1975 for joint profit of

lease or sale of property including Tunnel Number Three. Accordingly, the City and AEL&P are joint partners when and if the tunnel becomes available for profitable disposal. That may be why the City never exercised its eminent domain powers.

The City now uses Tunnel No. 3 as a water reservoir.

Mr. Keen informed the City in 1982 that it was trespassing on his property.

In early 1985, Mr. Keen sent a friendly offer to settle in favor of owner the illegal use of owner's tunnel by the City.

The trade contemplated was that the City would obtain water rights to the tunnel in exchange for certain concessions and land to Alaska Trams to allow the tramway project to go forward.

Pursuant to discussions on April 22, 1985, and Mr. Keen's earlier friendly offer, Ordinance No. 85-41 was proposed on May 20, 1985. This ordinance granted Alaska Trams an easement for a road to its mining claims on Mount Roberts; conveyed air rights; and removed the repurchase clause on earlier-acquired property. In consideration for the above, Mr. Keen agreed to grant to the City "in perpetuity an unrestricted easement to use water from Tunnel No. 3 as it exists as a C.B.J. reservoir."

Ordinance No. 85-41 was resubmitted as Ordinance 85-53 in June 1985. The City Manager and Attorney recommended that the ordinance not be passed, and that an appraisal be done on any claims regarding the tunnel before Assembly action. Despite these concerns and criticisms of the City Manager and Attorney, the Assembly on July 1, 1985, in a 7-1 vote passed Ordinance No. 85-53(am). It is clear on its face that Ordinance No. 85-53(am) was a contract between Alaska Trams and the City to resolve the tunnel dispute and allow the tramway to be built. The Alaska Superior Court, in ruling on the motions in this case, found that a contract had

been formed between the City and Petitioners. The ordinance was a "settlement" in which, in consideration for Alaska Trams giving an "easement in perpetuity" to the City to continue its use of Tunnel No. 3, the City conveyed certain real property and aerial rights to Alaska Trams.

Alaska Trams and Mr. Keen, believing they had a contract, hauled equipment, including two tractors, by helicopter to the top of Mt. Juneau, built a work camp and leveled the top of the mountain with written permission of the City in order to build a tram as a tourist attraction.

Due to litigation with A.E.L.&P. over aerial rights for one of the initial tram routes, Alaska Trams was forced to temporarily seek Chapter 11 bankruptcy protection and then fend off an attempt to convert to Chapter 7 by one of Alaska Trams rivals. When Alaska Trams sought Chapter 11 bankruptcy protection, the City seized on this as an opportunity to undermine the contract, which had resolved the tunnel dispute conveying property rights as just compensation.

By January 13, 1986, the City Attorney's Office started recharacterizing Ordinance No. 85-53(am) to be "a very narrow ordinance having the limited purpose of providing the manager with authorization to settle Mr. Keen's claim against the City concerning Water Tunnel No. 3. The ordinance concerns Mr. Keen's "Tram Project" only incidentally."

An indication that the City might back out of the agreement by changing it from a mandatory requirement to a permissive requirement is reflected in a letter from City Manager Kevin Ritchie dated October 13, 1986, in which he stated, "You must provide this stamped survey to the city manager's office before the City and Borough of Juneau may consider any land conveyances and exchange." (Emphasis added). Mr. Kevin Ritchie, shortly thereafter, stated that the required survey should be delayed pending formal direction from the Assembly/Lands Committee: "This will keep you from potentially wasting money if the basin development is

later judged inconsistent with planning and zoning standards." Mr. Keen was concerned that the City would renege.

In a November 4, 1986, meeting of the Land Committee, an assemblyman suggested a comprehensive solution to the water tunnel problem and moved to recommend that the Manager hire an appraiser for the tunnel, and that the parties agree on the appraiser. On that same date, Sarah Felix of the City Attorney's Office in an attempt/plan to repudiate the contract, drafted a memorandum to Barbara Blasco, stating:

> Ordinance 85-53am is not an express contract. The ordinance does not create an implied contract. Ordinance 85-53am does not give rise to an equitable estoppel claim. The ordinance is instead an authorization for the manager to negotiate a settlement of a claim against the municipality and authorizes the manager to exchange certain municipal property for Water Tunnel No. 3.

On January 2, 1987, Mr. Walsh wrote a memo to the Assembly Lands Committee that "Ordinance 85-53(am) was adopted in 1985 in an effort to resolve the tunnel dispute."

Unbeknownst to Petitioners, on April 10, 1987 Barbara Blasco, City Attorney, drafted a memorandum to file re: Ordinance No. 87-34: Proposed Tunnel No. 3 Settlement. She assumed that the outcome of an appraisal would be that Keen's interest in the tunnel would be worth zero. She then made the following assumption/predictions as to the City's activities upon "discovering" the true value of Mr. Keen's claims:

b. Based on new information, must reevaluate ordinance.
c. Taxpayers' claim is now FAR STRONGER
d. Keen's position now FAR WEAKER
e. What Keen proposed to give us worth

nothing; what we proposed to give him worth lots

f. Can't do this; can't compromise a valueless claim this way

g. Now we know: can't give it, but can sell it at FMV with discount (not much); Keen has repeatedly offered to buy; throw in tunnel because it isn't worth anything [Emphasis in original]

She then went on to discuss "Keen as Liability":

a. Far less of a concern than taxpayer suit liability

b. Keen needs what the City has got: Land that can be used for tram

c. Needs the City as a friend

d. Damages nominal or less for both trespass and condemnation or inverse; have not "breached a contract" [Emphasis in original]

A mining appraiser by the name of Robert Paschall was located by May 14, 1987, and had agreed to perform an appraisal for approximately $8,000 plus costs. On May 15, 1987, Sarah Felix noted that a preliminary estimate of the value of the tunnel at $320 per foot, multiplied by 850 feet, provided an approximate value of $281,000 for the part of the tunnel that ran under Alaska Trams' two mining claims.

On June 17, 1987, Sarah Felix received a call from hand-picked appraisal "expert" Robert Paschall, who determined that the value of the mining claim was zero.[1] Mr. Walsh testified that the "zero" appraisal killed his plan.

[1]Following this conversation, Sarah Felix was asked by Ms. Blasco to review her research on "breach of promise, Alaska cases on estoppel, McQuillan on compromising claims, and the eminent domain statutes in 1983 in land use cases.

Further amendments were made to a plan prepared by Murray Walsh that was to be incorporated in a new Ordinance 87-34 in an illegal, closed-door meeting. These amendments had the effect of abrogating the settlement. Ms. Blasco testified that these amendments changed the deal set out in Ordinance 85-53(am).

Notwithstanding the City's breach of its contract, Mr. Keen continued to try and build a tramway. As a result of the passage of Ordinance No. 88-03 and Ordinance No. 88-60 on October 23, 1988, a cashier's check in the amount of $52,809.19 for a building permit plus other fees was given to the City as required by the City. Jim Michael Keen borrowed the money and bought the permits in the name of Mount Juneau Enterprise, on a Mount Juneau check.

The exchange for good and clear title to all city-owned property in Ordinance No. 88-03(am) and 88-60 was not finally completed until mid-July of 1989 by a payment of $80,700 for the property and $4,811.96 for past taxes due.

Mr. Walsh had promised Petitioners a 24-foot easement widening to 100 feet up the mountain. The City could not show good title to two pieces of property, and therefore, appellants expended funds for additional non-City owned property. Until the completion of the land exchange, the City would also not permit the Petitioners to conduct the work required to keep the building permit active. Petitioners started work clearing non-City owned land on South Franklin under a site grading permit, but were unable to continue when the City refused permission to cross City-owned land.

On August 20, 1990, Mr. Keen indicated he would substitute sheet piling because of theft problems and that Trucano Construction was going to help him drive the sheet piling. The City told Mr. Keen he had until October 18, 1990, to complete the retaining wall.

On October 29, 1990, the City and Mr. Keen entered into a good faith agreement resolving the issue of the lower retaining wall and giving Petitioners until April 30, 1991, to

complete the lower retaining wall.

On October 30, 1990, Kevin Ritchie issued a memo stating, "Chuck Keen and Alaska Trams have apparently substantially met all C.B.J. requirements to protect downhill property owners and the public on the South Franklin worksite."

However, almost six weeks later, the City decided that the insurance that Mr. Keen had obtained was not adequate, and demanded on December 7, 1990, that Mr. Keen's broker acknowledge the existence of comprehensive liability insurance within four days of the date of the demand.

On December 31, 1990, Mr. Ritchie again wrote to Mr. Keen that Trucano Construction must sign an agreement satisfactory to the City to undertake and complete the retaining wall, and that Mr. Keen must provide comprehensive liability insurance, by the close of business on January 22, 1991. Mount Juneau Enterprises was noted to be the permit holder.

On January 24, 1991, Mr. Ritchie in a memorandum to the Assembly indicated that Alaska Trams did not meet the requirements detailed in the December 31, 1990, letter. He did so even though his own consultants had informed him on January 23, 1991, that the insurance coverage was adequate.

On January 25, 1991, Mr. Ritchie went on the radio and announced that Alaska Trams did not meet the requirement to resolve the issues by January 22. The interviewer then noted that the bankruptcy trustee had asked the City to wait ten days before taking any action on the permits and that "the city will extend the permits for the purpose of working with the trustee, but an extension for Mr. Keen is unlikely." The interviewer then concluded that, "[I]f Chuck Keen still hopes to develop the Mt. Juneau tram he will have to start from scratch in seeking a city building permit."

The publication of this announcement that the permits were being pulled had the effect of drying up the sources of

financing for Petitioners, and investors were told by the City that the project was canceled.

On February 4, 1991, John Rice, the attorney for Mount Juneau Enterprises, informed Trustee Zerbetz that Mount Juneau Enterprises had paid for the building permits and was the sole owner of those permits.

Despite the knowledge that Alaska Trams was not the owner of the building permits, on February 15, 1991, George Lyle, bankruptcy counsel for the City, wrote to the trustee asking on behalf of the City to turn over $27,000 to the estate as a refund if the trustee notified the City that the "project is canceled for reasons out of the permit applicant's control." Ms. Blasco recognized that the automatic stay provisions applied to actions involving a debtor in bankruptcy court. No condemnation proceedings had ever been done as to the tunnel owned by Alaska Trams. Permission of the Court would have to be granted for relief from stay before condemnation proceedings could apply. Ms. Blasco preferred to make the entire tunnel litigation just go away through the trustee. Thus, Ms. Blasco and Mr. Lyle conspired to find a method to end the dispute over the tunnel litigation and cancellation of permits without going through bankruptcy court.

In fact, the bankruptcy trustee never canceled the tramway project and never requested that the permits be pulled. On March 6, 1991, Mr. Keen wrote to Mr. Ritchie confirming that the bankruptcy trustee had not canceled the project, and reiterating that the permits were owned by Mount Juneau Enterprises. Mr. Ritchie wrote back, stating that the trustee for the Alaska Trams estate had notified the City that the project was canceled. Mr. Ritchie stated that the unused balance of the project would be refunded to the estate, and that Mr. Keen would have to apply for a new building permit to restore the lower tram site to a safe condition.

By the time of the March 6, 1991 letter, the City was aware of the fact that the claim of A.E.L.P., which was the major creditor in the bankruptcy of Alaska Trams, had been settled and that Alaska Trams had moved to dismiss Alaska

Trams from bankruptcy, which motion was pending at that time. This letter which was written by Ms. Blasco was sent despite the City's knowledge of the motion to dismiss.

Following the permit cancellation, an emergency hearing was held before the Honorable Herbert Ross, Bankruptcy Judge, on Mount Juneau Enterprises' motion to enjoin the trustee from taking any action in regard to the building permits. Judge Ross held that inasmuch as the permits belong to Mount Juneau Enterprises, the trustee could take no action against them. Inasmuch as they belong to Alaska Trams, the trustee would have to notice out any attempt to abandon them. Insofar as the property might belong to Alaska Trams, the City's action "was a violation of the automatic stay. The City might have shot itself in the foot, possibly subject themselves to sanctions by taking an action against estate property." The judge also stated to Mr. Keen:

> I'll tell you, this, I'm saying this not really facetiously, but the hope of recovering the case might have just been improved ... if the City has violated the automatic stay in a way that really caused an injury to the project. (Exc. 179)

The City would not be able to take any adverse action against the permits without moving for release from the automatic stay provisions of the Bankruptcy Code. The Bankruptcy Judge also noted that the City had engaged in obvious maneuvering to create obstacles on the building permits to obtain a technical advantage in the tunnel litigation: "I know that they have experienced bankruptcy counsel working in relationship to this Mt. Juneau waterway, tunnel project and that the mechanics or the maneuvering is underlying all this, probably."

On March 11, 1991, Mr. Ritchie wrote to Mr. Keen that the City would not consider the building permits as having been canceled by the trustee at this time. However, Mr. Keen sent several letters to the City inquiring as to the status of his permits, as financing had been canceled due to

the news stories and comments by the City that the permits had been pulled. On March 22, 1991, Mr. Ritchie wrote to Mr. Keen, maintaining his position that the status of the permits was still in "limbo." On April 3, 1991, Mr. Ritchie again wrote to Mr. Keen that the permits were still valid. On April 5, 1991, Mr. Ritchie wrote that the permit conditions were still in effect except that the April 30, 1991, deadline was amended to May 31, 1991. However, Petitioners were unable to work without written permission of the trustee, at least according to the City. On May 8, 1991, Alaska Trams was discharged from bankruptcy. That left only 23 days for the deadline. By that point, Mr. Trucano had already removed his heavy equipment and was in Haines, Alaska, and Mr. Keen asked for a six-month extension to obtain new financing and the equipment to complete the retaining wall, but the City refused. (Exc. 197)

The Petitioners commenced this instant lawsuit in early June 1991. Following the commencement of the lawsuit, the permits were officially cancelled.

## VIII. REASONS FOR GRANTING CERTIORARI.

### A. It Is Fundamentally Unfair And A Violation Of Basic Due Process For Private Property To Be Taken Through A Fraudulent Conveyance To A Governmental Entity To Avoid Paying Just Compensation

Under Article 1, Section 18 of the Alaska Constitution, private property shall not be taken without just compensation. In conjunction with the constitutional provisions, the State of Alaska has enacted a comprehensive statutory scheme for municipalities in applying eminent domain. See AS 09.55.240 et seq. and AS 29.35.030. It is undisputed that the City never utilized the eminent domain statute.

State, Department of Highways v. Crosby, 410 P.2d 724, 728-729 (Alaska 1966) held that even though the State had not utilized condemnation proceedings prescribed by law

and by rule, it had exercised the power of eminent domain constituting an inverse condemnation when the "State mistakenly, but in good faith" believed it had the right to rely upon reservation of a right-of-way for highway purposes contained in a patent.

The Fifth amendment to the United States Constitution requires that the federal government take private property only for public uses and only upon the payment of just compensation. The just compensation clause has been interpreted as part of the concept of due process under the Fourteenth amendment. Webb's Fabulous Pharmacies Inc. v. Beckwith, 449 U.S. 155, 159 (1980). Furthermore, Article 1, Section 18 also mandates just compensation for a governmental taking.

In this case, the City knew that the AEL&P did not have property interest to convey the tunnel for storage of water. The City had received title reports that showed AEL&P's lack of conveyable interest and did not do a title report upon AEL&P's bogus conveyance. Therefore, the City did not act in good faith.

Therefore, Petitioner's property interest through an option entitled them to just compensation for the taking of the tunnel. The City did not condemn the property. Upon the purchase of the tunnel by Petitioners in 1982, they obtained complete legal title and the City was a mere trespasser. As a matter of constitutional law, Petitioners have property rights that cannot be extinguished without just compensation.

B. It Is Fundamentally Unfair And A Violation Of Due Process For A Governmental Entity To Abrogate A Contract And Therefore Extinguish Property Rights Without Just Compensation.

A proposition or offer made to municipal authorities "and an acceptance of the terms of it by an ordinance, resolution or motion constitutes a contract." 10 McQuillan, The Law of Municipal Corporations (3rd Ed. 1990 Revised),Sec. 29.03. See also Williston on Contracts at 282-283 (4th Ed. 1990). Mr. Keen made an offer to settle the

tunnel dispute for certain property rights in order to build the tramway. The Assembly passed Ordinance 85-53(am) as a result. The trial court found that the language of Ordinance 85-53(am) "supports Alaska Trams' argument that it established the terms of the settlement agreement between the parties." This settlement agreement, as stated in the facts, constituted a settlement whereby Alaska Trams would settle the tunnel dispute and obtain substitute property rights as just compensation.

"An ordinance is to be construed in the light of the surrounding circumstances and conditions under which it was enacted." 6 McQuillan, The Law of Municipal Corporations (3rd Ed. 1988 Revised), Sec. 20.46. "The general rule is that ordinances should be "liberally construed" to give them the effect intended." Id. at Sec. 20.49. The trial court stated, "The City does not seriously dispute that the Ordinance established certain rights and duties in the parties."

The Alaska Supreme Court has simply skirted the constitutional issues by determining there was no enforceable contract through enactment of Ordinance 85-53am "because it requires future legislative action . . . it would require the Assembly to agree in advance to authorize the exchange of unspecified parcels of land in the future" (Opinion at p. 19). Under its own terms Ordinance 85-53am is a settlement "GRANTING" and "CONVEYING" specific property rights for Mr. Keen's grant to the City in perpetuity of an unrestricted easement to use Water Tunnel Number Three. Nothing in the title or body of Ordinance 85-53am states that the City Manager is being authorized to negotiate a settlement. Nowhere in Ordinance 85-53am is future legislative action required. The contract is enforceable. Sections 3(b) and (c) of the Ordinance conveyed some five parcels of land and there were no conditions on the conveyance of these parcels.

A governmental entity cannot later decide that they don't like the deal they made, and then abrogate the contract. In effect the voiding of a contract constitutes the exercise of eminent domain resulting in a taking without just compensation. The power of eminent domain extends to

tangibles and intangibles, including contracts, City of Cincinnati v. Louisville & Nashville R. Co., 223 U.S. 390, 400 (1912).

C. It Is Fundamentally Unfair And A Violation Of Due Process To Destroy The Value Of A Building Permit By Impeding The Ability Of The Permit Holder To Effectively Use The Permit And Such Government Action Amounts To Taking Without Just Compensation.

Mount Juneau paid over $50,000 for the building permits needed for the tramway project. A license for which a substantial sum has been paid constitutes property. McQuillan, The Law of Municipal Corporations (3rd Ed. Revised 1986) at Sec. 26.01a. The Petitioners also spent tens of thousands of dollars in clearing the land, conducting surveys and geotec soil studies, in engineering time and in purchase of private property. This is an investment of a substantial sum of money. Where a license has been purchased for a "substantial sum" of money, "work done, obligations incurred, expenditures made," vested property rights arise. Id. at Sec. 26.14. Furthermore, on October 29, 1990, the City through its agents, Mr. Ritchie, Ms. Blasco and Mr. Roust, signed an agreement with Mr. Keen that the building permits would not be yanked, and that Petitioners would have until April 30, 1991, to complete the retaining wall on the property.

The City saw a window of opportunity while Alaska Trams was in Chapter 7, to evade due process and gain tactical advantage in the "Tunnel Litigation" by the simple expediency of having the trustee cancel the permits so as to deal a final death blow to Alaska Trams and then kill its ability to continue to litigate the tunnel claim. The bankruptcy court ultimately determined that the permits were a valuable asset that couldn't be abandoned or sold off without notice, and rejected the attempted cancellation by the City in cahoots with the trustee and trustee's attorney. Furthermore, the City was aware of the interest that Mount Juneau had in the permits, and that Mount Juneau had filled out the application form for

the permits, that Mount Juneau had paid for the permits, and in various communications from the City , the City was aware that Mount Juneau had an interest in these building permits. Yet the City still attempted to have the trustee liquidate these permits, irrespective of the interest of Mount Juneau.

The actions by the City undercut the ability of Petitioners to comply with the October 29, 1990, agreement in other ways, including (1) Mr. Ritchie informing Mr. Trucano basically that he was proceeding at his own risk due to the Chapter 7 bankruptcy; (2) going on the radio on January 25, 1991, and basically informing the public that the permits were dead; (3) Mr. Ritchie, in a letter of March 6, 1991 written by Ms. Blasco, pulling the permits, even though the City was informed by appellants' counsel that Mount Juneau was the permit holder, that the bankruptcy court would have to decide the status of the permits, and despite the knowledge that Alaska Trams had moved to dismiss the bankruptcy. These actions prevented Petitioners from completing the retaining wall each time the City was notified that Petitioners were ready to do the necessary work.

The City again and again undercut the financial backing of the appellants and though the Petitioners requested an additional six-month extension of time so that they could obtain the new financing following the dissipation of the previous financial backing and also get a contractor to come back on the property to build a retaining wall, the City refused. (Note that the retaining wall which the City was so intent on using as a sword against Petitioners was always a bogus issue. Mr. Ritchie has acknowledged that there has been no slide from the property and in fact the City, though pressing Petitioners constantly to build the retaining wall, over a year later was saying it wasn't even necessary to build said retaining wall.)

The City continuously thereafter sought to pull the permit to obtain an advantage in the tunnel litigation which is improper and violates the obligation of good faith in regard to the permits and the agreement. The actions of the City impaired the use of the building permits. Non-acquisitive

governmental action may amount to a taking in a constitutional sense. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); United States v. Causby 328 U.S. 256 (1946); Lenoir v. Porters Creek Watershed District, 586 F.2d 1081, 1093 (6th Cir. 1978). Overregulation of property can also result in a taking. Rotunda & Nowak, Treatise on Constitutional Law: Substance and Procedure, 2nd § 15.12. The impediments to the building permit by the City constitutes a taking for which just compensation is due.

## IX. SUMMARY AND CONCLUSIONS

The Bill of Rights (Amendments to the United States Constitution) and the Declaration of Rights (Article I to the Alaska constitution) are an enumeration of rights possessed by the people of the United States and the State of Alaska, respectively. These rights are recognition of the danger engendered by an unfettered government against its own people. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the Alaska Constitution protect the due process property rights of the citizens of the United States and Alaska against their own government taking property without just compensation.

The Petitioners herein were deprived of their property without just compensation by the City. The abuse of governmental power is reflected in the fraudulent conveyance of property interests not possessed by AEL&P to the City so that the City would not exercise the eminent domain statutes to condemn property and thus have to pay just compensation; abrogating a contract with Petitioners extinguishing property rights resulting from the contract without just compensation; and impeding a building permit resulting in constructively depriving Petitioners of their vested property rights in the building permit, thereby depriving Petitioners of property without just compensation.

Unless this Court accepts Petitioners case, this manifestly unjust, illegal abuse of governmental power and the deprivation of private property rights without just compensation, will remain unremedied. It is a challenge to the

fundamental due process rights of all Americans. Therefore, Petitioners respectfully ask that the Court grant certiorari and rule that with no good faith by the City as to its quit claim deed, it must institute formal condemnation proceedings with full due process rights and allow suit to go forward as to the damages for the breach of contract as to the tram ordinance and as to the building permits..

Respectfully submitted this 18th day of February, 1997.

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